

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

FAIR POLITICAL PRACTICES	)	
COMMISSION,	)	2:12-cv-00093-GEB-CKD
	)	
Plaintiff,	)	
	)	<u>ORDER DENYING MOTION TO STAY</u>
v.	)	<u>PENDING APPEAL</u>
	)	
UNITED STATES POSTAL SERVICE,	)	
	)	
Defendant.	)	
_____	)	

Pro se non-party William Eisen moves under Federal Rule of Appellate Procedure ("Rule") 8(a)(1) for a stay pending appeal of the Order filed on October 16, 2012, in which the United States Postal Service ("USPS") was directed to disclose under the Freedom of Information Act ("FOIA") the quantity of mail sent using a USPS bulk mailing permit. Eisen requests in the alternative that if his motion is denied he be granted "a temporary stay of 10 days . . . to allow sufficient time for a presentation of a motion for a stay to the Court of Appeals." (ECF No. 41, 5:11-12.)

**I. BACKGROUND**

On November 10, 2008, the California Fair Political Practices Commission ("FPPC") received a sworn complaint alleging that Eisen violated the California Political Reform Act's disclosure requirements by sending out mass mailings in connection with his reelection campaign without properly identifying himself as the sender. (Compl. ¶¶ 8-10.)

1 Since this disclosure requirement only applies to mailings of "over two  
2 hundred substantially similar pieces of mail," the FPPC requested from  
3 the USPS the quantity of mail sent using the bulk mailing permit during  
4 the time period in question. (Id. ¶ 12 & n.4.) When the USPS refused to  
5 tender this information, citing FOIA Exemptions 3 and 4 as the basis for  
6 the refusal, the FPPC filed the instant federal action under FOIA. Eisen  
7 moved to intervene in this action as a matter of right, or  
8 alternatively, by permission of the Court. (ECF No. 10.) His motion to  
9 intervene was denied, and he subsequently filed an interlocutory appeal  
10 of the denial of his intervention motion. (ECF Nos. 21-23; Appeal No.  
11 12-16165.) Eisen did not, however, move to stay the FOIA case pending  
12 appeal of the denial of his motion to intervene. Nor did he request  
13 expedited briefing and hearing of his appeal. Instead, he moved "for an  
14 order to permit [his] opening [appellate] brief to be filed late."  
15 (Appeal No. 12-16165, Dkt. 6, 1:26-27.) Meanwhile, the underlying FOIA  
16 action proceeded, and the parties filed cross-motions for summary  
17 judgment. (ECF Nos. 29-30.) On October 16, 2012, following a hearing on  
18 the cross-motions, judgment was entered in favor of the FPPC, and the  
19 USPS was directed to disclose the quantity of mail sent using the bulk  
20 mailing permit by November 5, 2012. (ECF Nos. 37-38.) Eisen then filed  
21 an appeal of this judgment, and on October 30, 2012, he moved for a stay  
22 of enforcement of the judgment pending his appeal of the same. (ECF Nos.  
23 39-41; Appeal No. 12-17438.)

## 24 II. DISCUSSION

25 Rule 8(a)(1) prescribes the procedures that "[a] party" must  
26 follow to move for a stay pending appeal. Likewise, Rule 3(c)(1)(A)  
27 prescribes that the notice of appeal must name "the party or parties  
28 taking the appeal," and Rule 4(a)(1)(B) provides that the "notice of

1 appeal may be filed by any party." Rules 3 and 4 "clearly contemplate  
 2 that only parties may file a notice of appeal." United States v. City of  
 3 Oakland, Cal., 958 F.2d 300, 301 (9th Cir. 1992). Similarly, "Rule 8(a)  
 4 requires that a party seek a stay from the district court when appealing  
 5 the district court's judgment." In re Imperial Real Estate Corp., 234  
 6 B.R. 760, 762 (B.A.P. 9th Cir. 1999). Eisen is not a party in this  
 7 action. As an unsuccessful intervenor, Eisen may "'not appeal from any  
 8 subsequent order or judgment in the proceeding.'" Stringfellow v.  
 9 Concerned Neighbors in Action, 480 U.S. 370, 378 (1987) (citation  
 10 omitted). "Denial of intervention 'terminates' [an] applicant's  
 11 participation in the litigation and bars the applicant from appealing  
 12 the later judgment." City of Oakland, 958 F.2d at 302 (citing  
 13 Stringfellow, 480 U.S. at 377-78); see also United States v. \$129,374 in  
 14 U.S. Currency, 769 F.2d 583, 590 (9th Cir. 1985) (rejecting unsuccessful  
 15 intervenor's challenge to entry of summary judgment since absent  
 16 extraordinary circumstances "'one who was not a party of record before  
 17 the trial court may not appeal that court's judgment'" (citation  
 18 omitted); 7C Charles Alan Wright et al., Federal Practice and Procedure  
 19 § 1923 (3d ed. 2007) ("One . . . whose application to intervene is  
 20 denied, ordinarily may not appeal from any subsequent order in the  
 21 proceeding."). Only if Eisen's appeal of the denial of his motion to  
 22 intervene were successful could he then appeal the underlying judgment.  
 23 See League of United Latin Am. Citizens v. Wilson, 131 F.3d 1297, 1301  
 24 n.1 (9th Cir. 1997) (stating that "if it were concluded on appeal that  
 25 the district court had erred in denying the intervention motion, and  
 26 that the applicant was indeed entitled to intervene in the litigation,  
 27 then the applicant would have standing to appeal the district court's  
 28 judgment") (emphasis added); DBSI/TRI IV Ltd. P'ship v. United States,

1 465 F.3d 1031, 1037 (9th Cir. 2006) (same); Canatella v. California, 404  
2 F.3d 1106, 1109 n.1 (9th Cir. 2005) (same). However, Eisen's appeal of  
3 the denial of his motion to intervene has not been judged successful, as  
4 it remains pending.

5 Since Eisen is a non-party, he can neither move for a stay  
6 pending his appeal of the judgment nor appeal the judgment itself.  
7 Accordingly, Eisen's motion for a stay pending appeal of the judgment is  
8 denied.

9 Eisen's alternative request for a temporary stay of ten days  
10 concerns the equitable factors of whether Eisen has demonstrated a  
11 likelihood of success on the merits of his motion to intervene, combined  
12 with possible irreparable injury, or whether serious legal questions  
13 combined with a balance of hardships favor granting the stay. Levia-  
14 Perez v. Holder, 640 F.3d 962, 964 (9th Cir. 2011) (citation omitted);  
15 see also, United States v. Nat'l Broad. Co., Inc., 842 F. Supp. 402, 405  
16 (C.D. Cal. 1993) (considering and denying motion for stay pending appeal  
17 of denial of intervention); United States ex rel. Richards v. De Leon  
18 Guerrero, No. 92-00001, 1992 WL 212272, at \*2 (D. N. Mar. I. May 22,  
19 1992) (considering motion for stay pending appeal of denial of  
20 intervention since "a court may exercise its discretion" in considering  
21 such motions "in the same fashion as it deals with an injunction pending  
22 appeal").

23 To be entitled to intervene as a matter of right Eisen was  
24 required to show he had a "significant protectable interest relating to  
25 the property or transaction that is the subject of the action." Citizens  
26 for Balanced Use v. Mont. Wilderness Ass'n, 647 F.3d 893, 897 (9th Cir.  
27 2011) (citation omitted). Eisen alleged in his intervention application  
28 that the information the FPPC requests is "contained in USPS postage

1 statements issued under a standard mail postal permit[, which]  
2 belong[ed] to the Committee Against Measure BB for which Eisen was the  
3 treasurer." (Eisen's Appl. to Intervene ("Appl.") 1:26-28.) The  
4 information that the USPS has been ordered to release to the FPPC is  
5 simply the number of pieces of mail that were sent using a bulk mail  
6 permit on certain dates. (ECF No. 37, 10:24-11:1.) Eisen makes the  
7 conclusory argument that this information "comprises [his] personal  
8 data[,]" the "[r]elease of [which] . . . would infringe on [his  
9 constitutional] right to privacy." (Appl. 1:26; Eisen's Reply 3:6-7;  
10 Eisen's Ans. 2:16-21, 6:1-2.). However, Eisen has not shown he has a  
11 likihood of prevailing on this argument, since the postal permit at  
12 issue belonged to a committee for which he was the treasurer.

13 Nor has Eisen shown that he is likely to prevail on the merits of  
14 his permissive intervention argument, which was premised on his  
15 contentions that disclosure would violate his rights to privacy, freedom  
16 of speech, and freedom of association, and that the FPPC has unclean  
17 hands, since he failed to demonstrate how these defenses shared a common  
18 issue of law or fact with the FPPC's FOIA claim. (Eisen's Proposed Ans.  
19 2:15-21.) "The language of [Rule 24(b)(2)] makes clear that [permissive  
20 intervention under Rule 24(b)(2)] must be denied since Eisen's defenses  
21 and claims] contain[] no question of law or fact that is raised [in] the  
22 main action . . . ." Kootenai Tribe of Idaho, 313 F.3d 1094, 1111 (9th  
23 Cir. 2011), abrogated on other grounds by Wilderness Soc. v. U.S. Forest  
24 Serv., 630 F.3d 1173 (9th Cir. 2011).

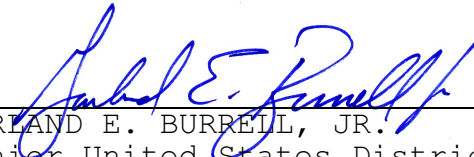
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1 For the stated reasons, Eisen's request for a temporary ten  
2 (10) day stay is denied.

3 Dated: November 1, 2012

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6 GARLAND E. BURRELL, JR.  
7 Senior United States District Judge  
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